No. 96-1768

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

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C. ELVIN FELTNER, JR.,

*Petitioner*,

v.

COLUMBIA PICTURES TELEVISION, INC.,

*Respondent*.

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## REPLY BRIEF FOR PETITIONER

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### I. THE COPYRIGHT ACT GUARANTEES THE RIGHT TO A JURY TRIAL IN ACTIONS FOR STATUTORY DAMAGES

In arguing that Section 504(c) directs that decisions on statutory damages be made by a judge, Columbia first relies on authority establishing that "the words 'court' and 'judge' 'have been used interchangeably.' " Resp. Br. 13 (quoting *In re United States*, 194 U.S. 194, 196 (1904)). The point is undisputed. Columbia goes astray, however, in contending that references to "the court" *always* include *only* the trial judge, to the exclusion of the jury. It has no answer to our demonstration that such references have long been understood to include both judge and jury. Pet. Br. 12. While it takes issue with our use of dictionaries to support this proposition, Resp. Br. 16 n.14, it notes only that definitions equating "court" and "judge" are "[i]ncluded among the many definitions" of

these terms. That observation does nothing to undercut the fact that references to "court" may include the jury as well. Indeed, a dictionary cited by Columbia's amici states that the term "court" means "[a] body organized to administer justice, *and including both judge and jury*." *Black's Law Dictionary* 352 (6th ed. 1990) (emphasis supplied).[1]

In the specific context of the copyright laws, moreover, references to "the court" historically have required a jury trial on demand. That much is plain from the 1856 Act, discussed in our opening brief and ignored by Columbia and its amici in their statutory discussions. That Act stated that damages in the context of dramatic compositions were to be assessed—in an "action on the case or other equivalent remedy" (*i.e.*, at law)—"at such sum not less than one hundred dollars for the first, and fifty dollars for every subsequent performance, *as to the court * * * shall appear to be just*." Act of Aug. 18, 1856, ch. 169, 34th Cong., 1st Sess., 11 Stat. 138, 139 (emphasis supplied). It is undisputed that this language, requiring assessment of damages "as to the court shall appear to be just," was used in a context where Congress plainly understood that trial by jury would be available.[2]

The 1856 statute is not so readily divorced from the current statute as Columbia pretends. While Columbia claims that "'[i]n lieu of' damages were a complete departure from the

[1] *Black's Law Dictionary*, of course, defines the term "in its familiar legal sense," Resp. Br. 15, 16, thereby meeting Columbia's curious objection that we have relied on meanings of the term "court" outside the legal context. *Id.*

[2] Columbia effectively concedes that "court" in the 1856 Act means "jury." In discussing the remedial provisions of that Act, Columbia argues that the statute permitted an award of "actual damages with a floor." Resp. Br. 29. "[I]t is beyond dispute that a plaintiff who seeks to recover actual damages is entitled to a jury trial." 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, § 12.10[B] at 12-155 (1997). Thus, by Columbia's own admission, Congress in the 1856 Act used the term "as to the court shall appear to be just" when a jury determination of damages was plainly contemplated. This language was retained throughout the later congressional enactments. *See infra* at 3.



remedies Congress had authorized under prior statutes," Resp. Br. 31, this Court has already recognized that the 1856 Act is the direct historical antecedent of the remedial provisions in the 1909 and 1976 Acts. *See* Pet. Br. 15-16. In *L.A. Westermann Co.* v. *Dispatch Printing Co.*, 249 U.S. 100, 107 (1919), the Court observed that the pertinent remedial provisions of the 1856 Act and similar subsequent acts "were brought together in the 'in lieu' provision" of the 1909 Act. *See also id.* at 109 ("terms of [the 1856 Act] were substantially repeated in the 'in lieu' provision of the [1909] Act"). It is undisputed that the 1976 Act, in turn, effectively reenacted the 1909 Act in pertinent part. Thus, the statutory damages provision at issue here did not emerge Athena-like in 1909, but rather directly traces its lineage to earlier provisions—provisions that indisputably preserved a jury trial opportunity.

The pedigree of the 1976 Act is also evident from the language Congress used. Both the 1909 and 1976 Acts carried forward essentially the same language that was understood in the context of the 1856 Act to require a jury where a party so desired. Thus, while the 1856 Act directed assessment of damages "as to the court shall appear to be just," the 1909 Act applied those remedies to additional types of infringement and permitted "in lieu of" damages "as to the court shall appear to be just." Act of Mar. 4, 1909, ch. 320, § 25(b), 60th Cong., 2d Sess., 35 Stat. 1075, 1081. The 1976 Act likewise permits statutory damages "as the court considers just." 17 U.S.C. § 504(c)(1).

Columbia ignores all this, examining only the "scant legislative history" of the 1976 Act itself, from which it finds no "meaningful * * * light on the issue before the Court." Resp. Br. 19. Columbia, however, offers no basis for discarding the settled principle that provisions drawn from earlier statutes are presumed to bring with them the meanings of those earlier enactments. *See* Pet. Br. 18.[3]

[3] One of Columbia's amici relies on a passage from a committee report discussing an earlier proposal, considered two years before the passage of the 1909 Act. *See* NFL Br. 11-12. The other por-

The lesson drawn from the pertinent history—that the statute guarantees a jury trial right—is confirmed by judicial interpretations extant at the time the 1976 Act was adopted. *See* Pet. Br. 19. Columbia tries to counter with *Chappell & Co.* v. *Palermo Cafe Co.*, 249 F.2d 77 (1st Cir. 1957), but does not dispute that that decision rested on the assumption—discredited almost immediately, and well before 1976—that a court of equity could award damages as "incidental to the relief by way of injunction." *Id.* at 81-82. *See* Pet. Br. 19. Columbia does attempt to distinguish *Mail & Express Co.* v. *Life Publishing Co.*, 192 F. 899 (2d Cir. 1912), *see* Resp. Br. 20 n.17, but cannot account for the fact that the court in that case expressly rejected the entire premise of Columbia's statutory argument—that "court" means judge alone. *See* 192 F. at 901 ("we do not think that by the use of the word 'court' it is required that the judge acting by himself shall assess the damages").

Columbia argues that Congress in 1976 overwrote the history of the statutory damages provision when it (a) used the term "court" in other portions of the statute to refer to the judge, and (b) permitted the plaintiff to elect statutory damages "at any time before final judgment is rendered." Resp. Br. 13-15. These arguments are unavailing.

The former argument is grounded in Columbia's refusal to recognize the historical pedigree of Section 504(c), and ignores the structure of the 1976 Act. Under that structure, equitable relief is provided in Sections 502 and 503, attorneys' fees in Section 505, and criminal penalties in Section 506. In Section 504, entitled "Remedies for Infringement: Damages and Profits," Congress provided legal remedies—as it certainly would have understood "damages" to be. Given the historical understanding of the language of Section 504(c), the structure of the 1976 Act, and the time-honored understanding that "damages"—including specifically damages under the Copyright Act—were properly assessed by a jury, Columbia's reliance on the language used by Congress in *other* sections of the Act cannot carry the day. In each of these instances—for example, the reference in Section 502 to the "court" awarding injunctions—the term "court" is understood to refer to the judge alone in light of the particular context and longstanding historical practice. Here, that same reference to context and historical practice establishes that a jury is available under Section 504(c).

Nor does Columbia's reliance on the timing of the statutory damages election override the historical understanding of the statutory language. Columbia asserts that it would "defy common sense" to require a jury determining actual damages to "reassemble after having been dismissed" to consider statutory damages if a plaintiff made the election after the jury's verdict. Resp. Br. 15. The judge, however, need only inform the plaintiff that judgment will be entered promptly after a verdict on actual damages, thereby requiring the plaintiff to make its Section 504(c) election while the jury is still empaneled. *See* Fed. R. Civ. P. 58 (requiring that judgment be entered "forthwith" following a jury verdict). The experience of the three Circuit courts, and district courts elsewhere, that have authorized jury trials on statutory damages for many years confirms that no practical problems have arisen from the election language.

In sum, Columbia's argument rests on little more than a reading of the ambiguous word "court" divorced from its legislative and historical context. Properly understood, the remedy of statutory damages in Section 504(c) carries with it a direction from Congress that a jury be available to award such damages. Certainly such a reading of the statute is

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tions of legislative history cited in that brief, *id.* at 12-13, establish only that some understood that statutory damages could be awarded by a judge where the infringement action was otherwise already in equity because of other relief that had been sought (*e.g.*, an injunction). That understanding neither establishes that Congress believed statutory damages were themselves equitable nor survives this Court's subsequent teaching in *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959), that legal remedies require a jury even where they are considered incidental to equitable relief. Indeed, the NFL brief concedes that in cases brought on the law side of the courts, "a jury would resolve the statutory damages question." NFL Br. 14 n.13.

" 'fairly possible,' " *Tull* v. *United States*, 481 U.S. 412, 417 n.3 (1987) (citation omitted), thereby permitting the Court to avoid the constitutional question that would otherwise be presented.

## II. THE SEVENTH AMENDMENT GUARANTEES THE RIGHT TO A JURY TRIAL ON ALL ISSUES PERTAINING TO THE IMPOSITION OF STATUTORY DAMAGES

### A. Copyright Actions Seeking Statutory Damages Were Historically Tried In Courts Of Law

Columbia asserts that the first factor in the Seventh Amendment analysis—the comparison with 18th century actions—is "neither fruitful nor probative of the issue before the Court." Resp. Br. 26. In fact, a comparison with pre-1791 precedents establishes that a claim for statutory damages under Section 504(c) is a legal claim triable to a jury upon demand.[4]

Columbia argues that the historical inquiry is irrelevant to this case because 18th century copyright actions were either legal or equitable, "depending on the remedy sought." Resp.

[4] Columbia faults us for using the term "statutory damages" to refer to "any damages authorized by a statute." Resp. Br. 7. We are unrepentant. We are aware of no other legal term that accurately describes amounts, other than actual damages, payable to a private party pursuant to a statutory provision, and Columbia's effort to affix a distinguishing label to the statutory damages in Section 504(c) ("Statutory Damages") only confirms that point. It is not true, as Columbia contends, that statutory damages in the early English and federal copyright statutes were "civil penalties." *Id.* at 7 n.10. As we have shown (*see* Pet. Br. 45-46), civil penalties are quite different from statutory damages in that they are paid entirely to the government, not private parties, to enforce public regulatory objectives. Nor is it true that courts have not used the term "statutory damages" to denote pre-1909 remedies under the Copyright Act. *See Jewell-LaSalle Realty Co.* v. *Buck*, 283 U.S. 202, 206 (1931) (remedial provisions of the Copyright Act of 1909 were intended "to incorporate in one section all of the civil remedies *theretofore given, including statutory damages* where the actual proof was lacking") (emphasis supplied).



Br. 25. The question under this Court's historical test, however, is whether Columbia's claim for statutory damages (rather than some other remedy) is analogous to a specific claim triable either at law or in equity prior to the adoption of the Seventh Amendment. The historical inquiry will often yield different results for the same cause of action "depending on the remedy sought." Historically, for example, a contract action was either legal or equitable, depending on whether the plaintiff sought damages or an injunction. The historical inquiry, far from being irrelevant in such circumstances, conclusively provides the answer.

So too in this case. Columbia stakes much of its argument on its claim that "nothing even remotely like the relief authorized under Section 504(c) was available under any statute when the Seventh Amendment was adopted or for well over 100 years thereafter." Resp. Br. 32; *see also id.* at 21 (1909 Act established "novel" form of relief "entirely distinct" from remedies under prior statutes); *id.* at 27 (Section 504(c) statutory damages "have no historical parallel" because "[n]othing like this remedy" was available until 1909). According to Columbia, the relief authorized by Section 504(c)—discretionary damages awarded from within a range of amounts—is entirely different from any remedy existing prior to 1791.

This assertion is simply not true. As we emphasized in our opening brief (*see* Pet. Br. 28, 30), in 1783 no fewer than three states (acting in response to a specific recommendation from the Continental Congress) enacted copyright statutes with remedial provisions virtually identical to Section 504(c), all of which were expressly enforceable only through actions *at law*. For example, New Hampshire's statute provided that a copyright infringer

> *shall forfeit and pay* a sum not exceeding one thousand pounds nor less than five pounds, to the use of such author or authors, or their assigns; *to be recovered by action of debt* in any court of record proper to try the same. [U.S. Copyright Office, *Copyright Enactments: Laws Passed in the United States Since 1783 Relating to*

*Copyright*, 140 Copyright Office Bulletin No. 3 at 8 (1973) (emphasis supplied).]

The Massachusetts and Rhode Island statutes contained nearly identical language, although the maximum award in those states was 3,000 pounds. *Id.* at 4, 9.

Columbia and its amici ignore these statutes completely, perhaps because they belie Columbia's central premise that ranges of discretionary damages like those in Section 504(c) were entirely unknown prior to the adoption of the Seventh Amendment.[5] As shown, lawmakers of that time not only were familiar with such remedies, but also knew that they were to be awarded by juries in actions at law.[6] These statutes, moreover, belie Columbia's assertions that the other statutory damages remedies of the day involved wholly different types of claims from that at issue here. To the contrary, when Congress established statutory damages in the Copyright Act of 1790—which Columbia concedes were enforceable only at law, *see* Resp. Br. 29—it described the

[5] These statutes did not merely authorize an award of actual damages, as shown by the fact that they used the language of forfeiture and were enforceable only through an action for debt. An action for debt was typically employed for the recovery of money lent, but was also employed for the recovery of statutory penalties, forfeitures, and amercements. *See* F.W. Maitland, *The Forms of Action at Common Law* 63 (1963 ed.). It was *not* used, however, for recovery of compensatory damages. *Id.* Thus, in the Copyright Act of 1790, Congress provided that recovery of statutory damages (for infringement of copyright in a published work) would be by an action for debt, but recovery of actual damages (for infringement of copyright in an unpublished work) would be by a special action on the case. *See* Act of May 31, 1790, ch. 15, §§ 2, 6, 1st Cong., 2d Sess., 1 Stat. 124, 125.

[6] Although some procedures in the states varied from English practice, there is no indication of any variation in the fundamental principle that an action for debt was an action at law triable to a jury. *Cf. Markman* v. *Westview Instruments, Inc.*, 116 S. Ct. 1384, 1389 n.3 (1996) (although historical test does not deal with possible conflict between English and American practices, "[n]o such complications arise in this case").



nature of that remedy using the *same* language as found in these state statutes.[7]

Columbia is also incorrect in its assertion that the sort of remedy provided by Section 504(c) is unique. *See* Resp. Br. 7-9. In fact, this Court has seen such a remedy before, and has found it to be legal, not equitable. In *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946), the Court held that Section 205(a) of the Emergency Price Control Act of 1942 authorized restitution of overcharges as an equitable remedy. The Court noted that another provision of the Act—Section 205(e)—authorized aggrieved parties to sue for damages. 328 U.S. at 401. Section 205(e) set the amount recoverable at the greater of (1) not more than three times the amount of the overcharge, "as the court in its discretion may determine," or (2) not less than $25 or more than $50, "as the court in its discretion may determine," provided that the recovery shall be the overcharge or $25, whichever is greater, if the defendant proves the violations were not willful. *See id.* at 406-407 n.9 (dissenting opinion) (setting forth text of Section 205(e)). This provision is substantively indistinguishable from Section 504(c)—it provides for an aggrieved private party to recover statutory damages (not actual damages) in a discretionary amount within a range, with a variation in recovery depending on the defendant's state of mind. In the course of its decision, this Court confirmed that "a court giving relief under § 205(e) [as opposed to § 205(a)] *acts as a court of law* rather than as a court of equity." 328 U.S. at 402 (emphasis supplied).[8] The same conclusion follows with respect to Section 504(c).

[7] *See* Act of May 31, 1790, ch. 15, § 2, 1st Cong., 2d Sess., 1 Stat. 124, 125 (copyright infringers "*shall* * * * *forfeit and pay* the sum of fifty cents for every sheet which shall be found in his or their possession * * * *to be recovered by action of debt* in any court of record in the United States, wherein the same is cognizable") (emphasis supplied).

[8] The significance of this Court's statement did not escape the lower courts; in reliance on it, courts of appeals held that actions under Section 205(e) and its counterpart in related statutes had to be tried to a jury. *See, e.g., Leimer* v. *Woods*, 196 F.2d 828, 832

Thus, the fixed amounts of statutory damages found in the early federal and English statutes and the ranges found in early state statutes and Section 504(c)—far from being entirely distinct remedies as Columbia contends—were all considered before the adoption of the Seventh Amendment to be claims enforceable only at law. When this fact is considered in light of Columbia's failure to identify *any* equitable claim of the day even remotely analogous to a claim for statutory damages under Section 504(c), it becomes apparent that the latter is a legal claim triable to a jury on demand.

### B. Statutory Damages Are Not An Equitable Remedy

1. Columbia's analysis under the second prong of this Court's test, the nature of the remedy, is similarly flawed. Because Columbia is seeking *damages* in this case—the hallmark of a legal remedy—it bears a formidable burden to demonstrate that such relief is equitable. As we have noted (*see* Pet. Br. 30-31), the Court has found an "exception to the general rule" that a claim for damages is legal only in certain narrow circumstances based on clear historical practice. *Chauffeurs, Teamsters and Helpers, Local No. 391* v. *Terry*, 494 U.S. 558, 570-571 (1990). Columbia therefore must show that these damages fall within one of the narrow categories of cases where courts of equity were traditionally authorized to award monetary relief.

Columbia has not come close to carrying its burden. It does not even *attempt* to argue that the damages it seeks fit into any historical exception (such as purely restitutionary awards), nor does it point to *any* traditionally equitable monetary remedy that even remotely resembles statutory damages under Section 504(c).[9] Instead, as noted, Columbia

(8th Cir. 1952); *Orenstein* v. *United States*, 191 F.2d 184, 189-190 (1st Cir. 1951). Indeed, this Court itself cited the discussion of Section 205(e) in *Porter* in support of the proposition that "[t]he Seventh Amendment does apply to actions enforcing statutory rights." *Curtis* v. *Loether*, 415 U.S. 189, 194 & n.7 (1974) (citing *Porter*, 328 U.S. at 401-402).

[9] Columbia attempts to compare statutory damages to only one equitable monetary remedy—awards of sanctions and costs, including attorneys' fees. *See* Resp. Br. 38. This analogy is inapt. Although this Court has not directly addressed the status of such awards under the Seventh Amendment, there is a historical basis for characterizing such relief as equitable (at least where it is not based on a contract), because judges in England traditionally were empowered to award costs and fees. *See Alyeska Pipeline Serv. Co.* v. *Wilderness Society*, 421 U.S. 240, 247 & n.18 (1975). But whatever the status of ancillary awards of sanctions and costs, they bear no relation to the core damages award at issue here.



asserts that such damages have no historical precedent at all. That assertion, as we have shown, is erroneous; but regardless, Columbia's failure to identify any analogous equitable remedy is fatal to its argument.

2. Rather than attempting to analogize an award of statutory damages under Section 504(c) to any monetary remedy traditionally awarded by courts of equity, Columbia contends primarily that such an award *must* be equitable because it involves the exercise of discretion. *See* Resp. Br. 34-35. This Court, however, flatly rejected this argument in *Tull* with respect to the civil penalties at issue there. As the Court explained, a monetary remedy is not rendered equitable merely because it "is not fixed or readily calculable from a fixed formula." 481 U.S. at 422 n.7.

Although the penalties at issue in *Tull*—fines paid entirely to the government in order to enforce and implement a complex regulatory scheme—are significantly different from statutory damages, the Court's rejection of the argument that the indeterminate nature of the award somehow renders the proceeding equitable in nature is fully applicable here. Historically, chancery courts exercised broad discretion in formulating their own equitable remedies, most notably injunctions, but it was *juries* in courts of law that imposed discretionary awards of *damages*. *See* Pet. Br. 43-44; 2 Dan B. Dobbs, *Law of Remedies* § 6.10(5) at 228 (2d ed. 1993) [hereinafter "Dobbs"] ("If a case is equitable, the judge may have discretion that is denied to the judge at law, but this hardly suggests that either the judge or the Congress could

convert a legal claim into a non-jury [claim] in equity by clouding the remedy with discretion.").[10]

Likewise, Columbia and its amici are wrong to contend that because the assessment of statutory damages under Section 504(c) involves the weighing or balancing of a variety of factors, it cannot be a legal remedy to be awarded by a jury. *See*, *e.g.*, Resp. Br. 35; NFL Br. 26-27; ASCAP Br. 3. One need only peruse any standard collection of jury instructions—including those in copyright cases—to confirm that the weighing of a variety of indeterminate factors is central to the jury's mission.[11] Indeed, it is precisely when a decision

[10] One of Columbia's amici (IACC Br. 23-24) misinterprets then-Justice Rehnquist's concurring opinion in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975). That opinion noted that backpay under Title VII is an equitable remedy in part because the court "retains substantial discretion as to whether or not to award backpay notwithstanding a finding of unlawful discrimination." *Id.* at 443. Discretion *whether* to award relief—not the exercise of discretion *in* awarding relief—is an attribute of equitable as opposed to legal remedies. As the opinion went on to note, "[t]o the extent that discretion is replaced by awards which follow as a matter of course from a finding of wrongdoing, the action of the court in making such awards could not be fairly characterized as equitable in character." *Id.* Under Section 504(c), the decision-maker has no discretion whether to award statutory damages (at least in the minimum amount) upon a finding of wrongdoing. *See* 1 Dobbs, *supra*, § 2.4(7) at 116 (exercise of discretion is "qualitatively different" with respect to legal and equitable remedies because "[j]udges and juries are not permitted to say that the plaintiff was injured as a proximate result of the defendant's negligence but that, as a matter of discretion, all money damages will be denied. Yet in equity, all equitable relief can be denied as a matter of discretion").

[11] *See*, *e.g.*, Edward J. Devitt, Charles B. Blackmar, and Michael A. Wolff, 3 *Federal Jury Practice and Instructions* § 99.08 at 816 (1987) (nonexclusive list of three factors for jury to consider in determining copyright infringement); *id.* § 99.09 at 820-821 (nonexclusive list of four factors for jury to consider in determining fair use in copyright infringement action); *id.* § 90.17 at 463 (nonexclusive list of five factors for jury to consider in determining if restraint of interstate commerce was unreasonable under Sherman Act); *id.* § 102.30 at 922-925 (nonexclusive list of thirteen factors for jury to consider in determining whether payments were debt or equity).



is to be made based on weighing the totality of circumstances that "we call what remains to be decided a question of fact—which means not only that it is meant for the jury rather than the judge, but also that there is no single 'right' answer." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1181 (1989).

In fact, as we have shown, it is when determinations of damages are discretionary that the traditional role of the jury is at its zenith. *See* Pet. Br. 43. It is also in such circumstances that the historic reasons underlying the Seventh Amendment are most directly implicated. Columbia and its amici represent a broad array of significant copyright holders, and they uniformly believe that their interests will fare better if they can enforce their property rights before judges rather than juries. At the time of the Framing, however, those advocating preserving the right to trial by jury were animated by a concern—borne out by their experience at the hands of British judges—that judges under the new Constitution would favor the interests of property holders and creditors.[12] Although Columbia and its amici object to giving juries discretion to fix statutory damages within the statutory range, the Framers of the Seventh Amendment were more concerned with the notion of leaving such power in the hands of judges.

3. Columbia also makes much of the facts that under Section 504(c) a plaintiff may elect either actual or statutory damages, and that statutory damages were afforded as an additional remedy because actual damages can be difficult to

[12] *See*, *e.g.*, 1 *The Debate on the Constitution* 84 (Bernard Bailyn, ed. 1993) (Freeman's Journal, Oct. 24, 1787); *id.* at 279-280 (Letter IV, Federal Farmer, Oct. 12, 1787); *see also* Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 Colum. L. Rev. 142, 150-153, 158 (1991); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 708 (1973).

prove. *See* Resp. Br. 33-34. In fact, the provision allowing statutory damages at a plaintiff's sole election supports our position, not Columbia's, because it makes clear that the damages will be awarded *without* any showing that other legal remedies are inadequate—a necessary predicate to the award of equitable relief. *See* Pet. Br. 36.

Nor are statutory damages rendered equitable merely because one of the motivations for their enactment was the difficulty of proving actual damages in some cases. To the contrary, as we have shown (*see* Pet. Br. 31-32), this same concern motivated Parliament to establish fixed amounts of statutory damages in the Statute of Anne—damages that Columbia *concedes* were legal, not equitable, in nature. *See* Resp. Br. 27. Thus, statutory damages, whether fixed amounts or ranges, do not supplement an inadequate legal remedy with an equitable one, but rather provide an alternative *legal* remedy to actual damages.

4. Finally, Columbia has failed to establish that the underlying purposes of statutory damages are equitable in nature. As we have shown, such damages are intended to serve the purposes of compensation, punishment, and deterrence—all traditional functions of *legal* remedies. Columbia responds that a particular award of statutory damages may, but need not, bear a direct relationship to these purposes. Resp. Br. 37-38 & n.26; *see also* NFL Br. 22. But the converse is even more accurate: it is highly unlikely that the award will bear any relationship whatever to traditionally equitable purposes, such as restitution. Columbia apparently contends that because statutory damages are intended to serve multiple purposes in a single award, they cannot be characterized as legal in nature. This analysis is entirely backwards. The Seventh Amendment preserves the right to a jury trial in all cases except " 'those where equitable rights *alone* were recognized.' " *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 41 (1989) (citation omitted; emphasis supplied). Columbia has not shown that its claim for statutory damages falls within this narrow category of cases, and the Seventh Amendment therefore requires that the claim be tried to a jury upon demand.



### C. The Jury Trial Right Extends To All Issues

Once the Court determines, as it should, that a claim for statutory damages under Section 504(c) is a legal claim triable to a jury on demand, the only remaining task is to determine which particular issues must be decided by that jury. That question, in turn, is governed by a historical test: if the jury would have decided a particular issue prior to the adoption of the Seventh Amendment, then the same is true today. *See Markman*, 116 S. Ct. at 1390. When that test is applied to Columbia's claim, it becomes apparent that the jury must determine all issues pertinent to the imposition of statutory damages under Section 504(c).[13]

1. Columbia appears not to dispute that if a claim for statutory damages is to be tried to a jury, the jury must decide factual issues pertaining to the number of infringements upon which statutory damages are calculated (or, as Columbia puts it, the number of works infringed). Instead, Columbia contends that there are no such factual issues in this case, because the number of infringements was determined as a matter of law. Resp. Br. 46-48. That contention is not supported by the decision below. As we have noted (*see* Pet. Br. 38 n.28), the Court of Appeals treated the District Court's resolution of these issues as factual findings, holding that the "evidence support[ed]" one finding, and that Feltner had failed to demonstrate that another "finding" was "erroneous." Pet. App. 15a, 17a. In fact, Columbia admits that "the number of copyrighted works infringed by each infringer" was a "question which remained at trial." Resp. Br. 3 n.3

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[13] Columbia avoids almost any mention of whether a judge or a jury must determine the question of infringement where that issue survives for trial. There can be no dispute that if the Court determines that a claim for statutory damages is legal in nature, the jury must decide infringement. *See* Pet. Br. 37-38 n.27. It should be noted, however, that under Columbia's theory that a claim for statutory damages is equitable in nature, the judge would decide *all* issues in the case, including the question of infringement. Thus, if Columbia prevails on its characterization of the claim as equitable, a plaintiff could avoid a jury on the critical question of infringement itself simply by electing one form of damages over another.

(emphasis omitted). Because Columbia does not dispute that factual issues pertaining to the number of infringements are for the jury if the claim itself is so triable, the jury must determine these questions on remand.[14]

2. There likewise can be little question that the jury must determine the factual questions of willfulness and innocence.[15] Columbia contends that because willfulness and innocence affect the amount of statutory damages, rather than underlying liability, these concededly factual issues need not be determined by a jury. *See* Resp. Br. 45. This argument proves far too much. Even if Columbia were correct (and it is not) that the amount of damages is for the judge to determine, *all* findings of material fact—for example, a finding that a particular infringing broadcast did or did not occur—can be characterized as affecting the amount of damages in some way. Thus, Columbia's argument, if accepted, would leave no role at all for the jury.

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[14] Columbia contends that Feltner characterized these issues as "legal" questions in his pretrial brief. *Id.* at 4, 47. That brief makes clear that Feltner considered these issues to be mixed questions of fact and law, depending on the evidence to be adduced at trial. *See, e.g.*, Def. Mem. of Contentions of Fact and Law 20-21 (R. 263) (each series is a collective work in light of factual evidence that individual episodes have no independent economic viability).

[15] Although Columbia concedes it never moved for summary judgment on the issue, it now contends that the evidence "mandated" a finding of willfulness. Resp. Br. 45-46 n.31. It suffices to note that the courts below did not so hold. The District Court rendered its finding on willfulness only after a full bench trial (*see* Pet. App. 22a-23a), and the Court of Appeals affirmed that finding under the "clearly erroneous" standard of review applicable to factual questions after noting that "Feltner's arguments, at best, demonstrate that the facts presented to the district court *were susceptible to more than one interpretation.*" *Id.* 13a (emphasis supplied). It is certainly possible that a jury presented with the evidence (including evidence that Feltner may have chosen not to present at a bench trial) would reach a different result. Indeed, it is the very premise of the Seventh Amendment that judges and juries might reach different results, even on the same evidence.



Moreover, the factual questions of willfulness and innocence bear none of the attributes that Columbia and its amici have contended require a judicial determination of the amount of damages. Unlike other factors that may influence the amount of statutory damages, and unlike the factors influencing the amount of the civil penalties at issue in *Tull*, findings on willfulness and innocence are mandatory under Section 504(c). Furthermore, unlike selecting the amount of damages to be awarded per work infringed, determining the defendant's state of mind is a pure factual question not entailing a wide exercise of discretion.

Thus, it is not surprising that Columbia cites *no* instance, either before or after 1791, in which judges have been permitted to make mandatory findings on the question of willfulness or innocence in connection with legal claims. It is irrelevant whether judges may make willfulness findings with respect to *equitable* claims, such as for attorneys' fees. *See* Resp. Br. 45; *supra* note 9. Once the Court determines that a claim for statutory damages is a legal claim triable to a jury, the remaining question is whether the jury must determine the specific issues of willfulness and innocence in order to preserve the substance of the common law right. As we have shown, there is no precedent for entrusting that basic factual determination to the judge. Just as it must determine the question of infringement, the jury must also determine whether that infringement was willful or innocent.[16]

3. The amount of damages within the statutory range is likewise for the jury to determine. Columbia's contrary

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[16] Columbia attempts to dodge the issue by contending that the willfulness finding was irrelevant here given the District Court's decision to assess damages at $20,000 per work infringed, which would have been the maximum possible without such a finding. *See* Resp. Br. 9, 23, 44. There is no basis for Columbia's assertion. The District Court specifically noted the wider range applicable to willful infringement before determining the amount within that range. *See* Pet. App. 23a. The Court of Appeals then affirmed that amount only after noting that the maximum award was $100,000 and that the District Court's award was "well within the statutory limits." *Id.* 18a.

argument relies almost entirely on a single sentence in *Tull*, in which the Court remarked that "[s]ince Congress itself may fix the civil penalties, it may delegate that determination to trial judges." 481 U.S. at 427. Whatever relevance that statement may have had to the civil penalties at issue in *Tull*, it has none here.[17]

Congress' ability to fix damages for statutory causes of action says nothing about whether a judge may assess such damages over a party's objection when Congress has not fixed them. *See, e.g.*, Geoffrey C. Hazard, Jr., *et al.*, *Cases and Materials on Pleading and Procedure* 1105 (7th ed. 1994) (characterizing statement in *Tull* as a "blithe nonsequitur"). Congress could fix the amount of damages as between private parties under *any* statutory cause of action, yet it has never been suggested that the Seventh Amendment permits judicial determination of damages as a result. For example, because Congress could prescribe the amount of damages for breaches of certain contracts, it does not follow that a party could prevent a jury determination of such indisputably legal damages when the amount has not been fixed. Indeed, Columbia's argument, if accepted, would mean that there is no right to a jury determination of *actual* damages for copyright infringement under Section 504(b)—a result plainly at odds with this Court's Seventh Amendment jurisprudence and the historical role of juries in copyright actions.[18]

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[17] The Court may have been referring in that sentence to the "public rights" doctrine that allows Congress to delegate to administrative agencies (and perhaps, as in *Tull*, to judges) the adjudication of issues relating to claims asserted by the government in its sovereign capacity. *See Granfinanciera*, 492 U.S. at 51-54 & n.8. This doctrine does not apply to cases, like this one, involving "private rights," defined as " 'liability of one individual to another under the law as defined.' " *Id.* at 51 n.8 (citation omitted).

[18] It is of no moment that copyright is a statutory right, as the Court has made clear that the Seventh Amendment applies in the same manner to statutory and common law claims. *See Curtis*, 415 U.S. at 193-194. Moreover, it is not true, as Columbia contends, that the amount of damages for copyright infringement was always fixed by statute. *See* Resp. Br. 42-43 & nn. 28, 29.



As we have shown, the import of this aspect of *Tull* is limited, at most, to the context of civil penalties.[19] By contrast, in cases like this involving damages payable to a private party for infringement of a property right, it has always been the fundamental role of the jury to assess such damages, no more so than where the damages are discretionary and uncertain. In our opening brief, we discussed numerous precedents in support of the basic proposition that the jury must decide the amount of damages, from early English cases holding that "by the law the jury are judges of the damages," *Lord Townshend* v. *Hughes*, 2 Mod. 150, 151, 86 Eng. Rep. 994, 994-995 (C.P. 1677), to Chief Justice Marshall's opinion in *Bank of Hamilton* v. *Dudley's Lessee*, 27 U.S. (2 Pet.) 492, 525 (1829), holding that the amount due under a statutory provision was a question which, in light of the Seventh Amendment, "must be submitted to a jury," to *Dimick* v. *Scheidt*, 293 U.S. 474 (1935), barring additur and unconditional remittitur. *See* Pet. Br. 41-44. Columbia has no answer: it fails even to cite, much less distinguish, any of these precedents, and cites *no* instance—and we are aware of none—in which judges were historically permitted to assess damages in an action tried at law.

In the Framers' view, the central purpose of the jury was to protect against judicial bias and corruption. *See, e.g.*, *The Federalist* No. 83, at 501 (Alexander Hamilton) (Clinton Rossiter ed. 1961); Pet. Br. 21-23. That purpose may not be implicated with respect to damage assessment when Congress fixes the amount recoverable, but plainly is implicated

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Copyright was originally a common law right in England enforceable through actions for actual damages in courts of law, *see* Pet. Br. 25, and the first federal copyright statute provided for the recovery of actual as well as statutory damages. *See supra* note 5.

[19] *See* Pet. Br. 45-46; *Defender Industries, Inc.* v. *Northwestern Mut. Life Ins. Co.*, 938 F.2d 502, 506 (4th Cir. 1991) ("While *Tull* does contain some rather broad language, the Court was deciding only the issue of whether the determination of the amount of a civil penalty imposed for violation of a federal statute could be delegated to the trial judge without the necessity of a jury determination."), *cert. denied*, 509 U.S. 923 (1993).

when the amount is to be selected by a judge from within a broad range. The breadth of the range here—$250 to $100,000 per work infringed—highlights the concern. The assertion that because Congress can fix the amount of damages, it can authorize judges to do so, wholly ignores the Framers' conception of the jury as a vital check on judicial power. The discretionary nature of statutory damages, far from negating a right to a jury determination of the amount, in fact compels one.

A citizen in 1791 told that copyright statutory damages would be assessed against him by a judge would surely feel that he had lost something of the common law jury trial right; after all, such actions had historically been tried at law, in England and America. Telling that citizen that the judge would have absolute discretion to set the amount of the levy against him within a broad range would make matters *worse*, not better as Columbia contends; and telling him that the judge's discretion would effectively be unreviewable would only confirm the totality of the loss.

## CONCLUSION

For the foregoing reasons, and those in our opening brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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